

COUCH WHITE
COUNSELORS AND ATTORNEYS AT LAW

Couch White, LLP
540 Broadway
P.O. Box 22222
Albany, New York 12201-2222
(518) 426-4600

Leonard H. Singer
Partner
Direct Dial: (518) 320-3406
Telecopier: (518) 320-3499
email: lsinger@couchwhite.com

October 23, 2009

VIA E-MAIL & FEDEX

Ms. Susan M. Hudson
Clerk
Vermont Public Service Board
112 State Street - Drawer 20
Montpelier, Vermont 05620

Re: Docket No. 7466 – Investigation into Petition Filed by Vermont Department of
Public Service Re: Energy Efficiency Utility Structure

Dear Ms. Hudson:

Enclosed for filing please find an original and six (6) copies of the Reply Brief of International Business Machines Corporation in the above-referenced proceeding. If you have any questions regarding this filing, please do not hesitate to contact me directly.

Very truly yours,

COUCH WHITE, LLP

Leonard H. Singer

Leonard H. Singer

LHS/dap

Enclosures

cc: All Parties on Attached Service List (via E-mail and U.S. Mail)

J:\DATA\Client7 13410-13600\13412\Corres\Hudson 10-23-09.doc

PSB Docket No. 7466 - SERVICE LIST

Parties:

Jeanne Elias, Esq.
Vermont Department of Public Service
112 State Street - Drawer 20
Montpelier, VT 05620-2601

Morris L. Silver, Esq. (for Central Vermont Public Service Corporation)
P.O. Box 606
Benson, VT 05731-0606

William F. Ellis, Esq. (For City of Burlington Electric Light Dept.)
McNeil, Leddy & Sheahan, PC
271 South Union Street
Burlington, VT 05401

S. Mark Sciarrotta, Senior Counsel
Vermont Electric Power Company, Inc.
Vermont Transco, LLC
366 Pinnacle Ridge Road
Rutland, VT 05701

Sandra Levine, Esq.
Conservation Law Foundation
15 East State Street, Suite 4
Montpelier, VT 05602-3010

Frank Fontana, Esq.
International Business Machines Corp.
Mailstop 967-P
1000 River Street
Essex Junction, VT 05452

Leonard H. Singer, Esq. (For International Business Machines Corp.)
Couch White LLP
540 Broadway - P.O. Box 22222
Albany, NY 12201-2222

Benjamin Marks, Esq. (For Green Mountain Power Corporation)
Sheehey Furlong & Behm, PC
30 Main Street - P.O. Box 66
Burlington, VT 05402

Donald J. Rendall, Jr., General Counsel
Green Mountain Power Corporation
163 Acorn Lane
Colchester VT 05446

Sandra Dragon, President
Associated Industries of Vermont
P.O. Box 630
Montpelier, VT 05601

Blair Hamilton, Policy Director
Vermont Energy Investment Corporation
255 South Champlain Avenue, Suite 7
Burlington, VT 05401

David John Mullett, Esq. (for 13 Municipal Electric Utilities¹)
Vermont Public Power Supply Authority
5195 Waterbury-Stowe Road
P.O. Box 298
Waterbury Center, VT 05677-0298

Avram Patt, General Manager
Washington Electric Cooperative, Inc.
PO Box 8
East Montpelier, VT 05651

Edward V. Schwiebert, Esq. (For Vermont Marble Power Division of Omya, Inc.)
Kenlan Schwiebert Facey & Goss, PC
71 Allen Street, P.O. Box 578
Rutland, VT 05702-0578

¹Barton Village, Inc. Electric Department, Village of Enosburg Falls Water & Light Department, Town of Hardwick Electric Department, Village of Hyde Park, Inc. Electric Department, Village of Jacksonville Electric Company, Village of Johnson, Inc. Water & Light Department, Village of Ludlow Electric Light Department, Village of Lyndonville Electric Department, Village of Morrisville Water & Light Department, Northfield Electric Department, Village of Orleans, Inc. Electric Department, Town of Readsboro Electric Light Department, Swanton Village Inc. Electric Department ("Group of Municipal Electric Utilities")

**STATE OF VERMONT
PUBLIC SERVICE BOARD**

Investigation into Petition Filed by Vermont Department)
of Public Service Re: Energy Efficiency Utility Structure)

Docket No. 7466

**REPLY BRIEF OF INTERNATIONAL BUSINESS
MACHINES CORPORATION**

Dated: October 23, 2009

**COUCH WHITE, LLP
540 Broadway
P.O. Box 22222
Albany, New York 12201-2222**

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
ARGUMENT	2
POINT I	
THE BOARD SHOULD REJECT A CHANGE IN THE EEU STRUCTURE FROM A COMPETITIVE SOLICITATION MODEL TO AN ORDER OF APPOINTMENT MODEL	2
POINT II	
IF, <i>ARGUENDO</i> , THE BOARD DECIDES TO IMPLEMENT AN ORDER OF APPOINTMENT, THE BOARD SHOULD ADOPT THE CONDITIONS RECOMMENDED BY IBM AND NOT THE CONDITIONS RECOMMENDED BY OTHER PARTIES TO THIS PROCEEDING	4
A. The Board Should Limit the Order of Appointment to Three Years	4
B. The Board Should Conduct an Overall Performance Assessment Prior to the Initial Order of Appointment	5
C. The Board Should Conduct an Overall Performance Assessment Every Three Years	7
D. The Board Should Allow For Alternative Funding to Offset the EEC	8
E. If the Board Decides That an EEU Advisory Committee is Necessary, the Advisory Committee Should Be Independent	8
POINT III	
IBM'S POSITIONS IN THIS PROCEEDING ARE RELEVANT AND CREDIBLE AND SHOULD BE UTILIZED BY THE BOARD IN RENDERING ITS DECISION	9
CONCLUSION	11

**STATE OF VERMONT
PUBLIC SERVICE BOARD**

Investigation into Petition Filed by Vermont Department)
Of Public Service Re: Energy Efficiency Utility Structure) Docket No. 7466

**REPLY BRIEF OF INTERNATIONAL BUSINESS
MACHINES CORPORATION**

INTRODUCTION

This Reply Brief is submitted by International Business Machines Corporation (“IBM”) in response to certain arguments contained in the proposed findings of fact and briefs of the Department of Public Service (“Department” or “DPS”), the Vermont Energy Investment Corporation (“VEIC”), the Central Vermont Public Service Corporation (“CVPS”)¹, the Conservation Law Foundation (“CLF”) and the Burlington Electric Department (“BED”). For the reasons set forth herein, the Vermont Public Service Board (“Board”) should reject certain arguments of the Department, VEIC, CVPS, CLF and BED and continue with the competitive solicitation structure for the Energy Efficiency Utility (“EEU”), which has efficiently served the State of Vermont and its ratepayers well for over a decade.

¹ The Group of Municipal Electric Utilities joined in the Proposed Findings of Fact and Brief of CVPS.

ARGUMENT

POINT I

THE BOARD SHOULD REJECT A CHANGE IN THE EEU STRUCTURE FROM A COMPETITIVE SOLICITATION MODEL TO AN ORDER OF APPOINTMENT MODEL

DPS, VEIC, CVPS, CLF and BED advocate for a change in the EEU structure from a competitive solicitation model to an Order of Appointment model due to alleged shortcomings of the current structure. (DPS Brief at 6-12, 26; VEIC Brief at 1-5, 18; CVPS Brief at 1-4, 18-21; CLF Brief at 1-5; BED Brief at 1-3, 6). However, such a drastic change is unnecessary. The current structure has provided numerous benefits to the State of Vermont and its ratepayers for well over a decade. In addition, over the next several years, electricity delivery and efficiency strategies should see more rapid changes, driven by the availability of new technologies, such as smart grid. Given the likelihood of these industry changes, locking into one energy efficiency service provider would not be in the best interests of the state or electric ratepayers.² A long-term Order of Appointment could lead to the following: (i) lack of incentive for the appointee to perform; (ii) limiting innovation and new ideas that might be brought by competition; and (iii) being locked into an Order of Appointment with an ineffective or high-cost appointee. Also, the Board should be mindful of the State's inexperience with Orders of Appointment. (6/26/09 Fratto pf. at 8).

² The Department asserts that one of the reasons why an alternative to the contract structure is being sought is that there has been a lack of competitive bidders to provide the energy efficiency services in Vermont. (DPS Brief at 11). However, as stated above, electricity delivery and efficiency strategies should see more rapid changes in the next several years. Such changes could lead to an increase in the number of competitive bids. Foreclosing that possibility in the current environment is not a sound policy choice.

DPS, CVPS and CLF also state that conducting a bid solicitation process every three years adds significant costs. (DPS Brief at 11; CVPS Brief at 17-18; CLF Brief at 3). However, the cost to conduct a bid solicitation process every three years is minimal compared to the annual and/or three-year budget for the EEU. It is IBM's estimate that the bid solicitation process costs between \$100,000 and \$150,000. Compared to, for example, the Board approved Energy Efficiency Charge ("EEC") collection of \$40.7 million for 2011, (6/26/09 Aldrich pf. at 12; 6/26/09 Poor pf. at 19) the cost to conduct a bid process is minimal. Therefore, the Board should reject the assertion that the bid solicitation costs justify use of an Order of Appointment model.

Moreover, various parties state that an Order of Appointment will result in more efficient participation in the ISO New England Inc.'s ("ISO-NE") Forward Capacity Market ("FCM"). (DPS Brief at 7; VEIC Brief at 2; CVPS Brief at 4; CLF Brief at 2; 4; BED Brief at 3). However, Efficiency Vermont has successfully participated in the ISO-NE FCM and there is no reason to believe that such successful participation will not continue into the future.³ Also, any issue associated with aligning the term of the EEU with obligations under the FCM could be addressed by requiring any successor EEU entity to assume and be fully responsible for all FCM obligations of the predecessor entity.

CVPS asserts that by granting the EEU greater discretion under an Order of Appointment large commercial and industrial customers will be better served. (CVPS Brief at 15). There is no valid basis for this assertion. CVPS fails to mention that the largest

³ In addition, the same end-of-cycle issues regarding the FCM that are present with the competitive solicitation model will also be present with a longer term Order of Appointment.

commercial and industrial customer in Vermont, IBM, rejects the concept of altering the structure of the EEU from a competitive solicitation model to an Order of Appointment. As stated above, it is IBM's position that the current competitive solicitation model has, and will continue to, efficiently serve the State of Vermont and its ratepayers.

POINT II

IF, *ARGUENDO*, THE BOARD DECIDES TO IMPLEMENT AN ORDER OF APPOINTMENT, THE BOARD SHOULD ADOPT THE CONDITIONS RECOMMENDED BY IBM AND NOT THE CONDITIONS RECOMMENDED BY OTHER PARTIES TO THIS PROCEEDING

If, *arguendo*, the Board decides to implement an Order of Appointment, the Board should adopt the conditions recommended by IBM in its Initial Brief. (IBM Initial Brief at 8-16). The Board should not adopt an Order of Appointment that includes the following conditions recommended by the various parties in the proceeding: (i) an Order of Appointment that exceeds three years; (ii) no Overall Performance Assessment ("OPA") prior to the initial Order of Appointment; (iii) mandatory OPAs that will be conducted every six years; (iv) not allowing alternative funding to offset the Energy Efficiency Charge ("EEC"); and (v) if the EEU Board decides that an Advisory Committee is necessary, the Advisory Committee should be appointed by the EEU.

A. The Board Should Limit the Order of Appointment to Three Years

DPS, VEIC, CLF and BED advocate that an Order of Appointment should be for a duration of six years, twelve years or for an indefinite timeframe. (DPS Brief at 12-16;

VEIC Brief at 5-7; CLF Brief at 1, 8-10; BED Brief at 3-5). Initially, it is significant to note that under Vermont Law, an Order of Appointment cannot exceed twelve years in duration. 30 V.S.A. § 209(d)(5). Most importantly, the Board should limit the Order of Appointment to a three-year term length. Such a term length allows the Board to make a formal assessment every three years regarding the appointee's performance. The Board could then make a determination of whether it should review competitive offerings in the energy efficiency service provider market. Also, it has been testified to that "[i]t is difficult to precisely determine how long the term of the Order of Appointment needs to be to achieve all of the benefits" described by the Department. (6/26/09 Fratto pf. at 9). Accordingly, the Board should implement an Order of Appointment that does not exceed three years in duration.

B. The Board Should Conduct an Overall Performance Assessment Prior to the Initial Order of Appointment

VEIC, CVPS, CLF and BED assert that due to the past success of the EEU, an OPA is not needed prior to the initial appointment. (VEIC Brief at 9-11; CVPS Brief at 17-18; CLF Brief at 11-12, 14; BED Brief at 5). To the contrary, an initial OPA is necessary prior to the initial Order of Appointment because it will allow for an initial performance evaluation of the incumbent EEU provider and an assessment of current market conditions. Such bench-marking will allow the Board to review the marketplace and consider alternative service providers that may be able to provide enhanced services. The DPS also strongly advocates for an OPA prior to the initial appointment because hundreds of millions of dollars are involved with the initial appointment. (6/26/09 Poor pf. at 18; 6/26/09 Fratto pf. at 11; H. Tr. 9/15.09 at 34). Therefore, the Board should undertake an OPA prior to the Initial Order

of Appointment so that it can assess the current EEU service providers in comparison to the marketplace.

In addition, several parties assert that the incumbent EEUs should be afforded a presumption that they will be selected as the initial appointees. (DPS Brief at 17-19; VEIC Brief at 16). However, there should not be a presumption that VEIC and BED should be awarded the initial Order of Appointment. The initial selection should be done after a competitive bid process to provide all potential bidders an opportunity to bid. A competitive solicitation prior to the initial appointment will ensure that the most cost-effective approach is taken.

Also, various parties to this proceeding have stated that an initial OPA prior to the initial Order of Appointment is cumbersome and too costly. (VEIC Brief at 10; CVPS Brief at 17; CLF Brief at 12; BED Brief at 5). However, given the fact that under Vermont law, the initial Order of Appointment may be for a term of up to twelve years, and that such a term would mean a commitment of approximately half a billion dollars, it seems more than reasonable for the Board to conduct an OPA prior to awarding the initial Order of Appointment. Therefore, the Board should reject any assertion stating that an initial OPA is cumbersome and too costly.

C. The Board Should Conduct an Overall Performance Assessment Every Three Years

The Department recommends mandatory OPAs at six-year intervals.⁴ (DPS Brief at 16). The VEIC also supports the concept of OPAs being conducted at six-year intervals. (VEIC Brief at 7-9). The Board should mandate that OPAs be conducted every three years to ensure that the EEU is operating in an efficient manner. EEU performance should be evaluated to protect ratepayers and make any necessary adjustments to the obligations of the EEU. Any review process that exceeds a three-year review process would provide the potential for too many years of poor or marginal performance in between OPAs. OPA's should also be conducted every three years to evaluate the energy conservation market to determine if any new technologies or approaches should be adopted. Accordingly, it is in the best interest of the State of Vermont and its ratepayers to conduct an OPA every three years to make certain that the EEU service provider is performing adequately.

A three year review process is also consistent with Vermont law. 30 V.S.A. § 209(e)(12) states "on or before January 1, 2003, and every three years thereafter, by an independent auditor of the reported energy and capacity savings and cost-effectiveness of programs delivered by any entity appointed by the board to deliver energy efficiency programs under subdivision (d)(2) of this section." Also 30 V.S.A. § 209(e)(2) states "[t]he linkage between compensation and verified savings in energy usage and demand (and other performance targets) shall be reviewed and adjusted not less than triennially by the board."

⁴ The Department also recommends that a Preliminary Performance Review ("PPR") of the EEU should be conducted on a three year basis. (6/26/09 Poor pf. at 15). After conducting a PPR, the Department will make a recommendation to the Board whether or not an OPA is necessary. (6/26/09 Poor pf. at 17).

D. The Board Should Allow For Alternative Funding to Offset the EEC

VEIC states that acquisition of non-EEC funding sources should not result in an offsetting reduction in available EEC funding. (VEIC Brief at 15). The Board should not only direct the EEU service provider to seek alternative funding, but the Board also should mandate that such alternative funding result in a corresponding reduction in the EEC. Such a reduction will reduce the burden of the EEU on the State of Vermont and its ratepayers.

E. If the Board Decides That an EEU Advisory Committee is Necessary, the Advisory Committee Should Be Independent

DPS and VEIC state that if the Board decides that an EEU Advisory Committee is necessary, the EEU should appoint and have the flexibility to create and determine the role and composition of an Advisory Committee. (DPS Brief at 25; VEIC Brief at 15). However, if the Board determines that the Advisory Committee is necessary, it should be an independent entity that reports to the Board. The Department's prefiled testimony directly contradicts its position in its Initial Brief regarding the independence of the Advisory Committee. DPS Witness Poor testified that "if an Advisory Committee is maintained as a function of the appointee, the Department asserts that the members should not be appointed by the EEU, as the required ratepayer-funded committee should be a completely independent body." (6/26/09 Poor pf. at 21). Accordingly, the EEU should not be given the authority to determine the role and composition of the EEU Advisory Committee.

POINT III

IBM'S POSITIONS IN THIS PROCEEDING ARE RELEVANT AND CREDIBLE AND SHOULD BE UTILIZED BY THE BOARD IN RENDERING ITS DECISION

CLF states that IBM's positions in this proceeding are not credible because they are not supported by specific scientific analysis or data personally developed and were not supported by any published reports or peer-reviewed studies or articles. (CLF Brief at 9). However, IBM's expert witness, Mr. Jonathan A. Aldrich, did base his testimony on his years of professional experience and on the information that was developed during the workshop process. (H. Tr. 9/16/09 at 159). Mr. Aldrich has extensive experience in the energy efficiency and conservation fields and his positions are highly relevant in assisting the Board in rendering a decision in this proceeding. Specifically, Mr. Aldrich has been the Site Energy Manager at IBM Vermont for the past six years. His job responsibilities include site electrical power budget planning and tracking, and site energy conservation and energy management programs. For the past eight years, Mr. Aldrich has been IBM's principal point of contact with Efficiency Vermont on all energy efficiency projects that have been submitted to Efficiency Vermont. Mr. Aldrich has initiated, planned, executed and coordinated energy conservation projects with Efficiency Vermont for a total value exceeding \$ 4 million.

Moreover, Mr. Aldrich has an extraordinary academic background. Mr. Aldrich received a Bachelor's Degree in Mechanical Engineering from Lowell Technological Institute in 1964. Mr. Aldrich is a registered engineer in the State of Vermont (#2843) and is


a certified Project Manager by the Project Management Institute. Mr. Aldrich has over 40 years of experience in managing operations and maintenance of facilities. Throughout these years of experience, Mr. Aldrich has been exposed to, and extensively involved in, requests for proposals and contract negotiations. This experience has provided Mr. Aldrich with an in-depth understanding of contractual arrangements and their corresponding advantages and disadvantages. Accordingly, IBM's expert witness, Mr. Aldrich, offers relevant and credible positions regarding the structure of the EEU which the Board should seriously consider in rendering a decision in this proceeding.

CONCLUSION

For the reasons set forth herein and in its Initial Brief, IBM respectfully requests that the Board maintain the competitive solicitation model as the appropriate model for the structure of the EEU. If, *arguendo*, the Board decides to change the structure of the EEU from the competitive solicitation model to an Order of Appointment, the Board should implement an Order of Appointment consistent with the conditions recommended by IBM in its Initial Brief. Such conditions will ensure that the State and its ratepayers will continue to be served by the EEU in an efficient manner.

Dated: October 23, 2009
 Albany, New York

Respectfully submitted,



Leonard H. Singer
COUCH WHITE, LLP
Attorneys for International Business
Machines Corporation
540 Broadway – 7th Floor
Albany, New York 12207
Telephone: (518) 426-4600
Telecopier: (518) 426-0376
E-Mail: lsinger@couchwhite.com